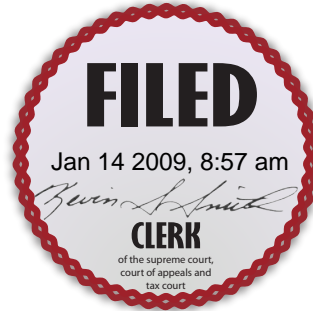


Pursuant to Ind. Appellate Rule 65(D), this Memorandum Decision shall not be regarded as precedent or cited before any court except for the purpose of establishing the defense of res judicata, collateral estoppel, or the law of the case.



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**IN THE
COURT OF APPEALS OF INDIANA**

DANIEL TRUEBLOOD,

Appellant-Defendant,

vs.

STATE OF INDIANA,

Appellee-Plaintiff.

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No. 67A01-0809-CR-448

APPEAL FROM THE PUTNAM CIRCUIT COURT
The Honorable Matthew L. Headley, Judge
Cause No. 67C01-0709-FA-130

January 14, 2009

MEMORANDUM DECISION - NOT FOR PUBLICATION

ROBB, Judge

Case Summary and Issues

Following a guilty plea, Daniel Trueblood appeals his sentence for child molesting, a Class B felony, and his sentence enhancement based on his status as a repeat sexual offender. On appeal, Trueblood raises two issues, which we restate as 1) whether the trial court properly sentenced Trueblood and 2) whether Trueblood received ineffective assistance of counsel. Concluding that the trial court properly sentenced Trueblood and that he did not receive ineffective assistance of counsel, we affirm. However, we remand sua sponte on a separate issue, instructing the trial court to correct its sentencing order to indicate that Trueblood's status as a repeat sexual offender is not an offense in itself, but merely an enhancement to his sentence for child molesting.

Facts and Procedural History

On September 7, 2007, twelve-year-old A.T., who was confined to a wheelchair due to hereditary spastic paraplegia, told her mother, Anna McCurry, that Trueblood, her father and McCurry's ex-husband, had touched her inappropriately ten or twelve times in the past seven months, including fondling her vagina on one or two occasions. McCurry confronted Trueblood with A.T.'s allegations, and Trueblood admitted them.

On September 21, 2007, the State charged Trueblood with two counts of child molesting, one as a Class A felony and one as a Class C felony, and also sought sentence enhancement based on Trueblood's alleged status as a repeat sexual offender.¹ On February 19, 2007, the parties entered into a plea agreement under which Trueblood

¹ To support its allegation that Trueblood was a repeat sexual offender, the State alleged that Trueblood had been convicted of Class D felony sexual battery in August 1997. See Ind. Code § 35-50-2-14 (stating that the State may seek to have a person sentenced as a repeat sexual offender if the instant charge is a sex offense and the person has accumulated a prior unrelated felony conviction for a sex offense).

agreed to plead guilty to child molesting as a Class B felony (and as a lesser-included offense to the Class A felony charge) and admit he is a repeat sexual offender. In exchange, the State agreed to dismiss the Class C felony child molesting charge.

After accepting Trueblood's guilty plea and repeat sexual offender admission, the trial court conducted a sentencing hearing, at which it heard testimony from, among others, McCurry, Trueblood, and Dr. Howard Wooden, a psychologist who conducted an evaluation of Trueblood at the request of Trueblood's counsel. The trial court also admitted into evidence reports from Dr. Wooden and from Trueblood's therapist. At the close of evidence, the trial court entered an order finding that Trueblood's criminal history, abuse of a position of trust, and A.T.'s physical infirmity were aggravating circumstances and that Trueblood's remorse was a mitigating circumstance. The trial court concluded that the aggravating circumstances outweighed the mitigating circumstance and sentenced Trueblood to twenty years, enhanced by ten years based on the repeat sexual offender admission, resulting in an aggregate sentence of thirty years. The trial court also ordered that Trueblood serve eighteen of the thirty years with the Indiana Department of Correction, with the remaining twelve years suspended to probation.

Discussion and Decision²

I. Propriety of Sentence

Trueblood argues the trial court abused its discretion when it refused to find the following mitigating circumstances:

- 1) Before the State filed the instant charges, Trueblood told law enforcement and his former therapist who counseled him in relation to the 1997 sexual battery conviction that he molested A.T.;
- 2) Trueblood instructed his counsel to forego A.T.'s deposition because he did not want her to endure further hardship;
- 3) Since November 2007, Trueblood voluntarily participated in a sex offender treatment program;
- 4) Trueblood is willing to pay restitution to A.T. for any therapy-related expenses she may incur;
- 5) Trueblood was employed until his arrest;
- 6) Trueblood pled guilty;
- 7) Trueblood has a child support obligation for two children from a previous marriage; and
- 8) Trueblood is likely to respond affirmatively to short-term imprisonment.

We will address each of these proffered mitigators in turn, but note initially that a trial court may impose any legal sentence “regardless of the presence or absence of aggravating circumstances or mitigating circumstances.” Ind. Code § 35-38-1-7.1(d). Despite such broad statutory authority, the trial court still may abuse its discretion in sentencing if it omits “reasons that are clearly supported by the record and advanced for consideration, or the reasons given are improper as a matter of law.” Anglemyer v. State, 868 N.E.2d 482, 490 (Ind. 2007), clarified on reh’g, 875 N.E.2d 218. The trial court’s

² The trial court appears to have entered a judgment of conviction based on Trueblood’s status as a repeat sexual offender. See Appellant’s Appendix at 11 (trial court’s sentencing order stating that it “finds [Trueblood] guilty of . . . Count III, Repeat Sexual Offender, as a Class B felony”). Status as a repeat sexual offender, however, is not a separate offense, but merely a factual determination that is used to enhance the sentence of the accompanying felony. Cf. Greer v. State, 680 N.E.2d 526, 527 (Ind. 1997) (“A habitual offender finding does not constitute a separate crime nor result in a separate sentence, but rather results in a sentence enhancement imposed upon the conviction of a subsequent felony.”). We therefore instruct the trial court to correct its order to reflect that a judgment of conviction was entered for one count of Class B felony child molesting only.

rejection of a proffered mitigator constitutes an abuse of discretion if the mitigator is significant and clearly supported by the record. See id. at 493. If the trial court abuses its discretion, “we have the option to remand to the trial court for a clarification or new sentencing determination, to affirm the sentence if the error is harmless, or to reweigh the proper aggravating and mitigating circumstances independently at the appellate level.” Cotto v. State, 829 N.E.2d 520, 525 (Ind. 2005).

Trueblood’s disclosures to law enforcement and to his former therapist, as well as his decision to forego A.T.’s deposition to spare her further hardship, can be described as derivative of his remorse – a mitigator the trial court found. To the extent Trueblood argues these proffered mitigators demonstrate his acceptance of responsibility, however, we are not convinced the trial court abused its discretion in refusing to find them as such because the disclosures occurred after Trueblood admitted his wrongdoing to McCurry, and the record does not necessarily indicate that Trueblood decided to forego A.T.’s deposition out of concern for her well-being. Indeed, the chronological case summary states Trueblood filed a deposition notice slightly over two months prior to entering into a plea agreement, which supports the reasonable inference that Trueblood’s decision to forego the deposition was more the result of the plea agreement than concern for A.T.

Regarding Trueblood’s participation in a sex offender treatment program and his willingness to pay restitution, although we applaud such efforts, neither is a significant mitigator. See Creekmore v. State, 853 N.E.2d 523, 530 (Ind. Ct. App. 2006) (stating that defendant’s desire to pay restitution to victim “need not have been given the same significance by the trial court as [defendant] would have it give”), clarified on denial of

reh'g, 858 N.E.2d 230; cf. Carter v. State, 711 N.E.2d 835, 839 (Ind. 1999) (“Although [defendant’s] academic achievement in the face of a pending murder charge is laudable, the trial court did not abuse its discretion by failing to find it as a mitigating circumstance.”). The same is true for Trueblood’s employment, see Newsome v. State, 797 N.E.2d 293, 301 (Ind. Ct. App. 2003) (“Many people are gainfully employed such that this would not require the trial court to note it as a mitigating factor”), trans. denied, and although a guilty plea may be a significant mitigator, it “does not rise to the level of significant mitigation where the defendant has received a substantial benefit from the plea” Wells v. State, 836 N.E.2d 475, 479 (Ind. Ct. App. 2005), trans. denied. On that point, Trueblood overlooks that he received a substantial benefit because the State agreed to let him plead to child molesting as a Class B felony (as opposed to the originally-charged Class A felony) and to dismiss the Class C felony child molesting charge.

Regarding Trueblood’s child support obligation to his other two children,³ we acknowledge that undue hardship to dependants is a statutory mitigator for the trial court to consider. See Ind. Code § 35-38-1-7.1(b)(10). However, Trueblood failed to present evidence indicating his incarceration would adversely impact his dependent children in a substantial manner. Such a failure is fatal to Trueblood’s claim because “absent special circumstances, trial courts are not required to find that imprisonment will result in an undue hardship.” Dowdell v. State, 720 N.E.2d 1146, 1154 (Ind. 1999). Finally, regarding Trueblood’s proffered mitigator that he would respond affirmatively to short-

³ Trueblood does not argue that his child support obligation to A.T. is a significant mitigator, apparently because McCurry testified at the sentencing hearing that he should “[g]o to prison for as long as possible” even though incarceration would leave his child support obligation unfulfilled. Transcript at 8.

term imprisonment, we acknowledge that this also is a statutory mitigator for the trial court to consider, see Ind. Code § 35-38-1-7.1(b)(7), but our review of the record indicates the evidence was to the contrary. Specifically, Dr. Wooden’s testimony, along with reports from Dr. Wooden and from Trueblood’s therapist, indicated that extensive, continuous therapy was the only way Trueblood would respond affirmatively and that he was likely to reoffend in the absence of such therapy. We therefore fail to see how Trueblood’s claimed affirmative response to short-term imprisonment is clearly supported by the record.

The trial court’s rejection of Trueblood’s proffered mitigators is illustrative of the well-established rule that “a sentencing court need not agree with the defendant as to the weight or value to be given to proffered mitigating facts.” Newsome, 797 N.E.2d at 301. Based on the foregoing analysis, we conclude the trial court did not abuse its discretion when it rejected Trueblood’s proffered mitigators.

II. Ineffective Assistance of Counsel

Trueblood argues he received ineffective assistance of counsel. To establish a violation of the right to effective counsel as guaranteed by the Sixth Amendment, the petitioner must establish both prongs of the test set forth in Strickland v. Washington, 466 U.S. 668 (1984). Wesley v. State, 788 N.E.2d 1247, 1252 (Ind. 2003). First, the petitioner must show counsel was deficient. Id. “Deficient” means that counsel’s errors fell below an objective standard of reasonableness and were so serious that counsel was not functioning as “counsel” within the meaning of the Sixth Amendment. Id. Second, the petitioner must show that counsel’s deficiency resulted in prejudice. Id. Prejudice

exists if “there is a reasonable probability that, but for counsel’s unprofessional errors, the result of the proceeding would have been different.” Strickland, 466 U.S. at 694. We need not address whether counsel’s performance was deficient if we can resolve a claim of ineffective assistance based on lack of prejudice. Wentz v. State, 766 N.E.2d 351, 360 (Ind. 2002).

Trueblood argues counsel was deficient because the expert opinion evidence his counsel introduced during the hearing – testimony from Dr. Wooden and reports from Dr. Wooden and Trueblood’s therapist – damaged his defense. Specifically, the expert evidence included opinions that Trueblood’s likelihood of reoffending was high, that he was powerless over his sexual desires, and that he will require strict supervision after release from incarceration. The expert evidence was not entirely damaging, however, as it also included opinions that Trueblood “was highly remorseful and is begging for help regarding his sexual problems,” appellant’s app. at 111; that he would respond favorably to extensive, continuous therapy, possibly to the point of controlling his sexual desires; and that he could not receive such therapy while incarcerated. This latter point was apparently central to Trueblood’s counsel’s defense strategy; that is, he recognized that some executed time was inevitable, but sought to minimize it by introducing evidence that supervised probation was preferable to incarceration because incarceration would prevent Trueblood from receiving adequate therapy. Dr. Wooden’s report directly addressed this point, stating that “the 12 year sentence with 8 years executed through the Department of Corrections [sic] recommended by [the probation officer] is excessive in

as much as this will delay the necessary therapeutic opportunities that [] Trueblood will require outside of a prison setting.” Id.

We are therefore left with a situation where counsel made a strategic decision to elicit evidence that, though partially damaging to his client’s case, permitted him to reasonably argue that extended executed time was counterproductive. Given the high degree of deference such decisions are afforded, see Crawford, 466 U.S. at 668, we cannot say counsel’s performance was deficient. Because Trueblood cannot establish counsel was deficient, it follows that he did not receive ineffective assistance of counsel.⁴

Conclusion

The trial court properly sentenced Trueblood, and Trueblood did not receive ineffective assistance of counsel. However, we remand with instructions that the trial court correct its sentencing order to indicate that Trueblood’s status as a repeat sexual offender is not an offense in itself, but merely an enhancement to his sentence for child molesting.

Affirmed and remanded with instructions.

CRONE, J., and BROWN, J., concur.

⁴ We also note that even assuming counsel’s performance was deficient, Trueblood merely makes a passing argument that the deficiency prejudiced his defense. See Appellant’s Brief at 12 (“Due to the specific statements of the trial court in the sentencing statement referring to [Trueblood’s] expert witness and following the recommendations of the expert witness, it is likely the outcome from the [trial court] would have been different if the evidence had not been presented to the [trial court].”). This conclusory argument overlooks that the trial court found three significant aggravators that were unrelated to the expert opinion evidence. Those aggravators alone are sufficient to convince us that Trueblood cannot establish prejudice.